

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
UNI-MARTS, INC.	:	DETERMINATION
	:	DTA NO. 806939
for Revision of a Determination or for Refund	:	
of Tax on Petroleum Businesses under Article	:	
13-A of the Tax Law for the Fiscal Year	:	
Ended September 30, 1983.	:	

Petitioner, Uni-Marts, Inc., 477 East Beaver Avenue, State College, Pennsylvania 16801, filed a petition for revision of a determination or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the fiscal year ended September 30, 1983.

On November 29, 1990 and December 10, 1990, respectively, petitioner by Harry A. Martin, Vice-President and Secretary, and the Division of Taxation by William F. Collins, Esq. (Gary Palmer, Esq., of counsel) agreed to waive a hearing and have the matter determined on submission of documents. All briefs were due by March 15, 1991.¹ After due consideration of the record, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation validly computed the gross receipts tax under Article 13-A based on the retail sale price.

FINDINGS OF FACT

Petitioner, Uni-Marts, Inc., is headquartered in Pennsylvania and was incorporated in Delaware on January 26, 1977. In October of 1982 it purchased several Quaker State gasoline

¹Petitioner, by Samuel H. Borenkind, Esq., and Morris A. Mondschein, Esq., submitted a brief dated January 28, 1991. The Division submitted a brief dated February 28, 1991.

stations in New York State and built retail food or "convenience" stores on each site.

Petitioner purchased gasoline in Pennsylvania and imported it into New York State for resale to retail customers at its convenience store locations.

Effective June 30, 1983, the Legislature imposed on petroleum businesses a gross receipts tax on sales of petroleum where shipments are made to points within New York State (Tax Law § 301, as added by L 1983, ch 400). Petitioner registered as a petroleum business under Tax Law § 302.

In computing its gross receipts tax for the fiscal year ended September 30, 1983, petitioner used the wholesale purchase price from its suppliers rather than the retail sales price to its retail customers in New York.

After an audit of petitioner's tax filings, the Division of Taxation sent to petitioner a Statement of Audit Adjustment dated March 23, 1987 indicating a gross receipts tax deficiency of \$1,800.00, plus interest. This adjustment was computed by multiplying the gross retail sales (minus any highway use tax and sales tax) for the period July 1, 1983 through September 30, 1983 by the statutory tax rate of 3.25%.

A Notice of Deficiency, dated March 23, 1987, was sent to petitioner asserting a tax deficiency of \$1,800.00, plus interest for the fiscal year ended September 30, 1983.²

By Conciliation Order, dated March 3, 1989, the conciliation conferee sustained the statutory notice.

Petitioner filed a petition, dated April 25, 1989, challenging the tax assessment as discriminatory. Petitioner argued that because it is both a distributor and a retailer, the gasoline it sells is taxed at the higher retail price than gasoline sold at the wholesale price by its competitors. Petitioner therefore claimed that it is at a competitive disadvantage because it, in effect, pays a higher tax per gallon.

CONCLUSIONS OF LAW

²A consent form extending the period of limitation of the assessment until June 15, 1987 was signed by Harry A. Martin, petitioner's secretary and treasurer, on October 1, 1986.

A. Tax Law § 301(a), in effect during the audit period in question, provided that every petroleum business pay an annual tax equal to 3¼% of its gross receipts from sales of petroleum where shipments are made to points within New York State. The gravamen of petitioner's challenge is that the tax imposed is unfair because, as both the distributor and retailer, its only sales in New York State were at the retail level and, therefore, the tax was based on the higher retail price, whereas distributors who are not retailers will pay the tax based on the lower wholesale price.

In support of its argument, petitioner cites to the December 1988 report of the Governor's Task Force on Administration of Taxes on Petroleum Products and Businesses (Report 3: Recommendations for Restructuring the

Article 13-A Gross Receipts Tax) wherein it was noted that the then current tax system under Article 13-A contributed to unfair competition in the industry because some petroleum businesses must compute their tax liability on a wholesale price while others must compute theirs on a retail price. Petitioner also refers to the amendments to Article 13-A which terminated the gross receipts tax and added a new monthly privilege tax computed on a cents-per-gallon basis as of September 1, 1990 (Tax Law § 301-a as added by L 1990, ch 190, § 216). Citing to a memorandum in support of these amendments, petitioner argues that this change in the law was in response to the 1988 report and industry representatives who claimed that the then current tax structure promoted unfair competition by imposing a tax at different levels of the distribution system.³

Notwithstanding the impetus for the change in the manner in which the tax was calculated under Article 13-A, there is no claim by petitioner that the law in effect during the audit period in question was applied in any manner other than in accordance with the language and intent of the statute. Indeed, the 1988 task force report and legislative history underlying the 1990

³Petitioner did not provide a copy of the memorandum and this memorandum could not be independently located in the Governor's Bill Jacket (L 1990, ch 190).

changes to Article 13-A support the Division of Taxation's application of the law in this case.

While the reasons for the legislative changes in 1990 may have been motivated by the perception that the then current law contributed to unfair competition, there is nothing in this cited legislative history to indicate that prior to the 1990 amendments Tax Law § 301 was in any way illegal or

constitutionally invalid. Moreover, even if petitioner's arguments alleging unfair competition and discrimination could be construed to allege that the statute was constitutionally invalid prior to September 1, 1990, the Division of Tax Appeals does not have the jurisdiction to determine the facial constitutionality of a statute (see, Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). At the administrative level, it is presumed that statutes are constitutional (Matter of Bucherer, Inc., Tax Appeals Tribunal, June 28, 1990; Matter of Phelps, Tax Appeals Tribunal, November 2, 1989; Matter of J. C. Penney Co., Inc., Tax Appeals Tribunal, April 27, 1989).

B. The petition of Uni-Marts, Inc. is denied and the Notice of Deficiency, dated March 23, 1987, is sustained.

DATED: Troy, New York
9/5/91

ADMINISTRATIVE LAW JUDGE